STATE OF MICHIGAN

IN THE SUPREME COURT

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a Minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

vs.

Supreme Court Docket No: 128913
Court of Appeals Docket No: 259519
Lower Court Case No: 96-013292-NI

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.
_____/

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SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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ARGUMENT

ALTHOUGH NO CONSERVATOR HAD BEEN APPOINTED, AND NO BOND HAD BEEN APPROVED BY OR FILED WITH THE PROBATE COURT, (1) THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION TO APPROVE THE SETTLEMENT AND ENTER AN ORDER OF DISMISSAL; (2) WITHIN THE MEANING OF MCR 2.612(C)(1)(f), THERE EXISTED NO OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT IN THIS CASE; AND (3) THE DISMISSAL IN THIS CASE OUGHT TO BE SET ASIDE AND THE SETTLEMENT OUGHT NOT TO BE REOPENED PURSUANT TO MCR 7.316(A)(7).

This brief is submitted in accordance with this Court's December 28, 2005 order requesting supplemental briefing regarding three specified issues. Each of those issues is separately addressed.

A. The Circuit Court Had Subject Matter Jurisdiction To Approve The Settlement And Enter An Order Of Dismissal.

It is undisputed that no conservator had been appointed, and no bond had been approved by or filed with the probate court, at the time the lower court approved the settlement and entered the order of dismissal. These circumstances did not, however, deprive the lower court of subject matter jurisdiction to approve the settlement and enter the order of dismissal.

Subject-matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case. *Travelers Ins. Co. v. Detroit Edison Co.*, 465 Mich. 185, 204, 631 N.W.2d 733, 744 (2001); *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998). Stated another way, subject matter jurisdiction is the right of the court to exercise judicial power over that class of cases, not the particular case before it. *Bowie v. Arder*, 441 Mich. 23, 36, 39, 490 NW2d 568 (1992); *In re*

AMB, 248 Mich.App. 144, 166-167, 640 N.W.2d 262 (2001); *Derderian v. Genesys Health Care Systems*, 263 Mich.App. 364, 375, 689 N.W.2d 145, 154 (2004).

A lack of subject matter jurisdiction must be distinguished from an error in the exercise of a court's jurisdiction. *Bowie v. Arder*, 441 Mich. 23, 40, 56, 490 N.W.2d 568, 576 (1992); *Altman v. Nelson*, 197 Mich.App. 467, 473, 495 N.W.2d 826, 829 (1992). This Court recognized this distinction long ago, as follows;

> "The loose practice has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity." *Buczkowski v. Buczkowski*, 351 Mich. 216, 222, 88 N.W.2d 416 (1958), *quoted with approval in Bowie v. Arder*, 441 Mich. 23, 40, 490 N.W.2d 568, 576 (1992) *and Altman v. Nelson*, 197 Mich.App. 467, 473, 495 N.W.2d 826, 829 (1992).

The Court of Appeals has expressed the same concept of subject matter jurisdiction, as follows:

> "There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void, although it may be subject to direct attack on appeal.
>
> . . . .
>
> Where jurisdiction of the subject matter and the parties exist, errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. Once jurisdiction of the subject matter and the parties is established, any error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends is error in the exercise of

> jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made.
>
> If the court has jurisdiction of the parties and of the subject matter, it also has jurisdiction to make an error." *Altman v. Nelson*, 197 Mich.App. 467, 472-473, 495 N.W.2d 826, 829 (1992).

Michigan circuit courts derive their subject matter jurisdiction from the Michigan Constitution and statutes. The Michigan Constitution vests the circuit court with broad original jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law. In particular, the Michigan Constitution provides that: "The circuit court shall have original jurisdiction in all matters not prohibited by law. . . ." Const. 1963, art. 6, § 13. MCLA §600.601 provides a similarly broad grant of subject matter jurisdiction as follows:

> "(1) The circuit court has the power and jurisdiction:
>
> (a) Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (b) Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (c) Prescribed by the rules of the supreme court.
>
> (2) The circuit court has exclusive jurisdiction over condemnation cases commenced under the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630.
>
> (3) In a judicial circuit in which the circuit court is affected by a plan of concurrent jurisdiction adopted under chapter 4, the circuit court has concurrent jurisdiction with the probate court or the district court, or both, as provided in the plan of concurrent jurisdiction, except as to the following matters:
>
> (a) The probate court has exclusive jurisdiction over trust and estate matters.

(b) Except as provided in section 411, the district court has exclusive jurisdiction over small claims and civil infraction actions.

(4) The family division of circuit court has jurisdiction as provided in chapter 10."

Michigan circuit courts are, therefore, courts of broad general jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law. *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Development Bd.*, 472 Mich. 479, 495, 697 N.W.2d 871, 881 (2005); *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998); *Derderian v. Genesys Health Care Systems*, 263 Mich.App. 364, 375, 689 N.W.2d 145, 154 (2004). Accordingly, the subject matter jurisdiction of circuit courts is presumed unless expressly denied by constitution or statute. *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998); *L.M.E. v. A.R.S.*, 261 Mich.App. 273, 279, 680 N.W.2d 902, 907 (2004). Any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated. *Campbell v. St. John Hosp.*, 434 Mich. 608, 613-614, 455 N.W.2d 695, 697 (1990).

Neither MCLA § 700.403 (now § 700.5102) nor MCR 2.420 in any way deprived the lower court of subject matter jurisdiction to approve the settlement and enter an order of dismissal in this case.

First of all, it must be emphasized that MCLA § 700.403 (now § 700.5102), does not apply to this case. MCLA § 700.403 was not intended to govern proceedings after a lawsuit had been commenced. Rather, MCLA § 700.403 was intended to govern the settlement of a claim on behalf of a minor before filing of suit. Thus, at the time the settlement in the instant case, MCR 2.420(A) stated that "**[b]efore an action is commenced**, the settlement of a claim on behalf of a minor or in an incompetent person is governed by the revised Probate Code." (emphasis added). Accordingly, this Court has recognized that MCLA § 700.403 does nothing more than delineate

when a debtor of a minor may make payments directly to the minor's parents without seeking judicial approval. *Smith v. YMCA of Benton Harbor*, 216 Mich App 552, 555, 550 NW2d 262 (1996). Nothing in the wording of MCLA § 700.403 in any way addressed the power and jurisdiction of circuit courts to approve settlements or enter orders of dismissal.

Similarly, MCR 2.420 did not deprive the lower court to approve the settlement and enter an order of dismissal in this case. The court rule explicitly provides that the circuit court **may approve the settlement**, even if the probate court has appointed a next friend or conservator, but that dismissal shall not be entered until the probate court has passed on the sufficiency of the bond of the next friend or conservator. Even if the settlement exceeds $5,000, MCR 2.420 places no restriction on the power of the circuit court to approve the settlement. Rather, the rule merely states that, in that circumstance, a conservator must be appointed before entry of the order of dismissal. The rule does not suggest in any fashion that the non-appointment of a conservator deprives the circuit court of subject matter jurisdiction to enter an order of dismissal. Most importantly, MCR 2.420 does not **clearly and unambiguously** divest the circuit courts of jurisdiction to enter an order of dismissal before appointment of a conservator. *Campbell v. St. John Hosp.*, 434 Mich. 608, 613-614, 455 N.W.2d 695, 697 (1990)(any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated). Indeed, it would be quite illogical to deny the circuit subject matter jurisdiction to enter an order in a case pending before it, and which unquestionably fell within the class of cases that can be determined by circuit courts. At most, MCR 2.420 indicates that it would be error to enter the order before a conservator has been appointed, but as discussed above, an error in the exercise of a court's jurisdiction is not at all the same thing as a lack of subject matter jurisdiction.

B. Within The Meaning Of MCR 2.612(C)(1)(F), There Existed No Other Reason Justifying Relief From The Operation Of The Satisfaction Of The Settlement In This Case.

MCR 2.612(C)(1)(f) provides that the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the basis of "[a]ny other reason justifying relief from the operation of the judgment." Although this court rule does not specify the criteria to be used in granting relief under this rule, it has been generally recognized that, in order for relief to be granted under this subsection, three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under MCR 2.612(C)(1)(a) through (e); (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice. *Altman v. Nelson*, 197 Mich.App. 467, 478, 495 N.W.2d 826, 831 - 832 (1992); *McNeil v. Caro Community Hosp.*, 167 Mich.App. 492, 497, 423 N.W.2d 241 (1988)(construing GCR 1963, 528.3(6), now MCR 2.612(C)(1)(f)).

Both this Court and the Court of Appeals have cautioned against an overly broad interpretation and application of MCR 2.612(C)(1)(f). *Alken-Ziegler, Inc. v. Waterbury Headers Corp.*, 461 Mich. 219, 234 fn 7, 600 N.W.2d 638, 645 fn 7 (1999); *Accord, Barclay v. Crown Building and Development, Inc.*, 241 Mich.App. 639, 654, 617 N.W.2d 373, 381 (2000). In *Alken-Ziegler*, this Court considered whether MCR 2.612(C)(1)(f) can be used as an exception to the requirements of MCR 2.603(D)(1), in order to set aside a default judgment. In that regard, this Court expressed the following caution in application of MCR 2.612(C)(1)(f):

> "We further note that MCR 2.603(D)(3) is available to prevent a manifest injustice. That rule empowers a court to set aside an entry of default and a judgment by default in accordance with MCR 2.612. MCR 2.612(C)(1)(f) states that a court may relieve a party from a final judgment for any reason justifying relief from the operation of the judgment. **However, we caution that the "any**

> **reason justifying relief" language should not be read so as to obliterate the analysis we have set forth regarding MCR 2.603(D)(1). Otherwise, the exception in MCR 2.612(C)(1)(f) could swallow the rule set forth in MCR 2.603(D)(1).**" *Alken-Ziegler, Inc. v. Waterbury Headers Corp.*, 461 Mich. 219, 234, 600 N.W.2d 638, 645 (1999).

This above quote is equally applicable to the context of the instant case. An overly broad interpretation of MCR 2.612(C)(1)(f) could swallow the rules specified in MCR 2.612(C)(1)(a)-(e). It was no doubt for this reason that a three pronged limitation has been recognized by the Court of Appeals in such cases as *Altman v. Nelson*, 197 Mich.App. 467, 478, 495 N.W.2d 826, 831 - 832 (1992) and *McNeil v. Caro Community Hosp.*, 167 Mich.App. 492, 497, 423 N.W.2d 241 (1988).

As the Court of Appeals noted in its opinion of January 20, 2004, the Plaintiff cannot satisfy the three elements necessary for granting relief under MCR 2.612(C)(1)(f). First of all, if the Plaintiff next friend had filed a timely motion, she could have sought relief under MCR 2.612(C)(1)(a), i.e., mistake. (January 20, 2004 Opinion of the Court of Appeals, at p. 3). In other words, the reason for setting aside the satisfaction of judgment falls within 2.612(C)(1)(a).

Secondly, Defendants' rights would be detrimentally effected if the satisfaction of the settlement was set aside, "since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." . (January 20, 2004 Opinion of the Court of Appeals, at p. 3). The prejudice to the Defendants is further aggravated by Plaintiffs' apparent insistence that the Defendants be required to pay the settlement once again, without any set-offs. In *Commire v. Automobile Club of Michigan*, 183 Mich. App. 299, 454 N.W.2d 248 (1990), the Court of Appeals held that the first $5,000.00 was properly paid to the father (even though he had not been appointed as conservator), pursuant to

MCLA § 700.403. The Court therefore held that the Defendant in that case was entitled to a $5,000.00 credit.

The prejudice to the Defendants, and the lack of any extraordinary circumstances, is further demonstrated by the fact that the Plaintiffs/Appellants apparently has recourse against the bank which cashed the settlement draft. This is demonstrated by the case of *Coates v. Drake*, 131 Mich App 687, 346 NW2d 858 (1984). In that case, a Plaintiff's attorney settled a case without his client's authorization or knowledge (a fact which does not exist in this instant case), forged the Plaintiffs' signatures upon the releases and settlement checks, and converted the settlement money to his own use. Although the Court of Appeals set aside the settlement because it was never authorized by the client, the Court also concluded that any recovery by the Plaintiffs against the bank which negotiated the check, and the Michigan Client Security Fund (now the Client Protection Fund of the Michigan State Bar), would be deducted from any award of damages the Plaintiffs obtained in their lawsuit against the Defendants. As indicated in the Statement of Facts contained in Defendants/Appellees Brief in Opposition to Application for Leave to Appeal, Norma Bierlein, the Next Friend, was equivocal as to whether or not she had signed the settlement check in this case. Accordingly, on this basis, the minor child has a potential claim against the bank which negotiated the check, just like the Plaintiff in *Coates v. Drake*, *supra*. In the instant case, the Plaintiffs have consistently failed to acknowledge this potential source of recovery.

Moreover, like the Plaintiff in *Coates*, the Minor-Plaintiff is entitled to seek compensation from the Client Protection Fund of the Michigan State Bar. Indeed, in its July 26, 2001 Order, the trial court in the instant case explicitly stated that the conservator shall make

application "to the Client Protection Fund with the State Bar of Michigan ..." (Exhibit M, attached to Brief in Opposition to Application for Leave to Appeal).

Additionally, the Plaintiff would certainly have the right to recovery in either criminal or civil proceedings against her previous counsel for his criminal misconduct, either in criminal proceedings or civil proceedings. Here again, the Plaintiffs have failed to indicate any willingness to even provide the Defendants with any set-off for such a potential recovery, if the courts were to grant their requested relief.

Finally, as already alluded to above, the Plaintiff has not demonstrated extraordinary circumstances. The settlement was made on the record, and the next friend agreed to the amount. The Plaintiff was aware that no conservator had been appointed, but she nonetheless agreed to the settlement, and the satisfaction of that settlement(January 20, 2004 Opinion of the Court of Appeals, at p. 3). Furthermore, the Plaintiff does have avenues of recovery against her prior counsel, the bank which cashed the settlement draft, and the Client Protection Fund of the State Bar of Michigan. Therefore, the Plaintiffs have failed to satisfy the elements necessary for relief under MCR 2.612(C)(1)(f).

For all of the foregoing reasons, Plaintiffs/Appellants cannot satisfy the elements necessary to relief under MCR 2.612(C)(1)(f), and they are therefore not entitled to relief under that rule.

C. The Dismissal In This Case Ought Not To Be Set Aside And The Settlement Ought Not To Be Reopened Pursuant To MCR 7.316(A)(7).

MCR 7.316(A)(7) provides that this Court may "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." Defendants submit that this rule was only intended to granted such relief as could have been granted **in the proceedings appealed from**. On the instant appeal, the Plaintiffs are appealing

from the lower court order reinstating the settlement. Defendants submit that this was the only order legally available to the lower court, and therefore the one that ought to have been entered.

Michigan has a strong public policy in favor of enforcing settlements of litigation. *Groulx v. Carlson*, 176 Mich App 484, 489, 440 NW2d 644 (1999). Accordingly, Michigan courts are generally reluctant to set aside such settlements. *The Metropolitan Life Insurance Co. v. Goolsby*, 165 Mich App 126, 128, 418 NW2d 700 (1987). A settlement agreement is binding when it is made in open court MCR 2.507(H). An agreement to settle a pending lawsuit is a contract and is to be governed by legal principles applicable to the construction and interpretation of contracts. *Michigan Mutual Insurance Co. v. Indiana Insurance Co.*, 247 Mich App 480, 498 NW2d 205 (2001). It has been held that settlements should not be upset merely because of any hesitation or secret reservation on the part of either party. *Meyer v. Rosenbaum*, 71 Mich App 388, 393, 248 NW2d 558 (1976). In short, it is the policy of Michigan that parties should be entitled to rely upon a settlement that was entered on the record, expressly approved by the court, and satisfied by the Defendant. Allowing a court to set aside such settlements without a legally recognized basis supported by the record would severely impair the ability of Michigan courts and litigations to bring litigation to a full and final conclusion.

In the lower court, the Plaintiff repeatedly argued that the settlement should be set aside because no conservatorship had been set up for the Minor-Plaintiff, and the settlement proceeds were apparently stolen by Plaintiff's counsel. Nonetheless, this was not a proper legal basis for setting aside a court approved settlement, nor would this be a proper legal basis for setting aside Defendants' satisfaction of that settlement. As the following discussion will demonstrate, the appointment of a conservator was not a condition precedent to Defendants' ability to satisfy and discharge their obligation under the settlement.

The Court of Appeals has held that a Next Friend or Guardian Ad Litem of an infant may give a binding assent to agreements which will facilitate the determination of a case, provided that the agreement has been approved by the court on a showing that it is for the best interests of the Plaintiff-Minor. *Plezanc v. Griva*, 86 Mich App 528, 533, 272 NW2d 712 (1978). Moreover, Michigan case law provides that a Next Friend has authority to receive payment and satisfy an award recovered by him or her in the name of the Minor-Plaintiff. *Denison v. Crowley, Milner, and Co.*, 279 Mich 211, 216, 271 NW 735, 737 (1937). Similarly, MCR 2.201(E)(3) recognizes that a Next Friend has authority to receive money awarded to a Minor-Plaintiff in a lawsuit. Although this rule also states that the Next Friend shall give security "as the court directs," the language of the rule does not state that it is mandatory for the court to order the posting of such security, nor does it state the amount of such security. Moreover, although the court in this case did not order the posting of such security, this does not mandate the conclusion that the Defendants had no right to satisfy the settlement by paying the Next Friend. Quite the contrary, any requirement of security was a matter for the trial court's discretion, and the lack of such security did not vest the Defendants with the right to refuse payment, nor did this situation create an obligation on the part of the Defendants to insist on the posting of such security.

Just as importantly, however, **the posting of a bond by the Next Friend in this case would not have had any benefit to the Minor-Plaintiff**. Again, this Court must keep in mind that it was Plaintiff's previous attorney, **not the Next Friend**, who stole the settlement proceeds. If a bond was posted by the Next Friend, it would only have secured the **Next Friend's** performance of **her duties**. The bond would not have secured **Plaintiff's attorney's** performance of **his duties**. In other words, even if the Next Friend has posted a monetary bond,

the Minor-Plaintiff would still be left without protection against the theft by Plaintiff's counsel. Accordingly, setting aside the settlement and Defendants' satisfaction of that settlement simply cannot be justified on the basis that the Next Friend did not give security.

Accordingly, to the extent that the Plaintiffs/Appellants may claim that the Next Friend did not have authority to receive payment of the settlement, and discharge Defendants' liability under that settlement, they are clearly incorrect.

Plaintiffs/Appellant's misapprehension in this regard appears to be based upon a misinterpretation of Michigan law. One of the provision relied upon by the Plaintiff in *Bierlein I* in the lower court was MCLA § 700.403 (now § 700.5102). At the time of the settlement in this case, this statutory provision stated as follows:

> Sec. 403. A person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000.00 per annum, by paying or delivering the money or property to the minor, if the minor is married; a parent or a person having the care and custody of the minor under a court order and with whom the minor resides; or a guardian of the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator is appointed or if proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the married minor receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor shall be turned over to the minor when the minor attains majority. A person who pays or delivers pursuant to this section is not responsible for the proper application of the sums.

Based upon this statutory provision, Plaintiff argued that the Defendants did not properly pay the settlement in this case, and did not properly obtain a discharge of their liability under that settlement, because the lump sum settlement was in excess of $5,000.00 and no conservator had

been appointed for the Plaintiff-Minor prior to the payment. The lower court's initial acceptance of this argument was erroneous, and was properly overturned by the Court of Appeals in *Bierlein I*. MCLA § 700.403 was not intended to govern proceedings after a lawsuit had been commenced. Rather, MCLA § 700.403 (now § 700.5102) was intended to govern the settlement of a claim on behalf of a minor without judicial approval. Thus, at the time the settlement in the instant case, MCR 2.420(A) stated that "[b]efore an action is commenced, the settlement of a claim on behalf of a minor or in an incompetent person is governed by the revised Probate Code." Accordingly, the Court of Appeals has recognized that MCLA § 700.403 does nothing more than delineate when a debtor of a minor may make payments directly to the minor's parents without seeking judicial approval. *Smith v. YMCA of Benton Harbor*, 216 Mich App 552, 555, 550 NW2d 262 (1996). Nothing in the wording of that statute precludes a Defendant from paying settlement proceeds directly to the minor's Next Friend, after the settlement has been approved by the trial court. Although the statute states that amounts not in excess of $5,000.00 can be paid directly to the child's parents, the statute does not purport to be the exclusive means by which a Defendant or potential Defendant can discharge his or her liability under a settlement. This statute certainly does not say that settlement proceeds cannot be paid to a Next Friend, after commencement of a civil action. Rather, the statute merely sets forth one general procedure that can be used to settle a controversy or an amount not in excess of $5,000.00 without court approval. The statute does not make a reference to the settlement of pending civil litigation, and does not purport to be the exclusive means by which to settle such controversies. In short, there is nothing in MCLA § 700.403 which prohibits a Defendant from discharging his or her liability under a settlement by paying the settlement amount to the minor's Next Friend, after the settlement has been approved by the court.

It is also significant that MCR 2.420(B)(4) makes reference to MCLA § 700.403 (now § 700.5102), but does not prohibit a Defendant from paying the settlement amount to the minor's Next Friend after approval of the settlement by the court. Rather, MCR 2.420(B)(4)(a) merely states that if the settlement or judgment requires payment of more than $5,000.00 to the minor in any single year, the trial court shall not enter judgment or dismiss the action until a conservator has been appointed by the Probate Court. There is nothing in this language which prohibits the Defendant from satisfying a settlement, and obtaining a full discharge of his or her liability under the settlement, before a conservator has been appointed. Indeed, there is no reason to prohibit such a payment and discharge, even prior to an appointment of a conservator. The reason for this is that the Next Friend is under the jurisdiction, and responsible to, the Circuit Court, with regard to the proper management of the settlement monies. In other words, at that point, there are three safeguards for the proper management of the settlement proceeds:

1. The trial court;
2. Plaintiff's counsel;
3. The parent/Next Friend.

Neither MCLA § 700.403 nor MCR 2.420(B)(4)(a) were intended to make a Defendant accountable for the proper management of the settlement proceeds after the settlement has been properly approved and paid to the Next Friend. Specifically, MCR 2.420(B)(4)(a) spells out the responsibility of the trial court to make sure that a conservator has been appointed by the Probate Court before trial court closes its file. This court rule does not state that a Defendant has the duty, or even the right, to refuse to pay court-approved settlement merely because a conservator has not been appointed, in a circumstance where a Next Friend has been appointed for the minor. In short, although MCR 2.420 states that the trial court shall not dismiss the action until a

conservator has been appointed, the same court rule **does not prohibit a Defendant from paying the settlement amount, and obtaining a discharge of liability under the settlement, prior to appointment of a conservator**.

The case of *Commire v. Automobile Club of Michigan*, 183 Mich App 299, 454 NW2d 248 (1990), relied upon by the Plaintiff in the lower court (and cited in the Application for Leave to Appeal to this Court) is markedly distinguishable from this case, based upon the principles outlined above. In *Commire*, there is no indication that the original settlement was achieved in the context of a pending civil action, and the implication is that the parties reached a settlement without such a suit. Accordingly, not only was the absconding father not a conservator, he was also not a Next Friend. Of course, given the fact that the claim was settled without a lawsuit, the settlement was achieved without court approval. Again, this is distinguishable from the instant case, in which the minor's mother was appointed as Next Friend and the court approved the settlement as being in the best interests of the minor.

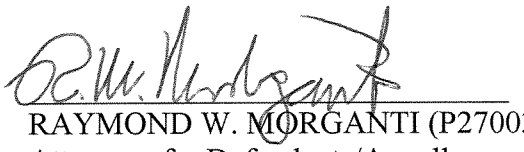
Accordingly, the lower court properly reinstated the settlement in this case. Within the meaning of MCR 7/316(A)(7), this was the relief that properly ought to have been granted.

RELIEF

For all of the foregoing reasons, Defendants/Appellees pray that this Honorable Court issue an order denying Plaintiffs/Appellants' Application for Leave to Appeal.

Respectfully submitted,

SIEMION, HUCKABAY, BODARY, PADILLA, MORGANTI & BOWERMAN, P.C.

By: 

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